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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 954. 47

FOX FILM CORPORATION,
Petitioner,

v.

A. B. MULLER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

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SAMUEL P. HALPERN,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT OF THE CASE.

The Facts.

The facts are accurately stated in the Petition for Writ of Certiorari, pp. 1-5.

Brief in Case No. 478.

When this case was before the Court earlier in the present term, Respondent filed a brief on the merits dealing

fully with all the points raised in the present petition. (See Brief for the Respondent, Case No. 478. October Term, 1934.)

These points will be dealt with in summary fashion in this brief, reference being made to the previous brief for amplification of the argument.

Reasons for Opposing the Writ.

1. The Supreme Court of Minnesota decided no Federal question.
2. The decision of the Supreme Court of Minnesota was consistent with the decisions of this Court.
3. The case is not one of general public importance.
4. The question on which the decisions of the lower Federal and State courts are in conflict is now academic.
5. The judgment of the Supreme Court of Minnesota can be sustained on grounds other than those assigned in the opinion.

ARGUMENT.

I.

The Supreme Court of Minnesota Decided No Federal Question.

When the Petitioner first sought a review of this case by writ of certiorari it claimed definite rights as against the Respondent under the decree in the case of *United States* v. *Paramount et al.*, 34 Fed. (2nd) 984; 282 U. S. 30, and alleged as ground for allowance of the writ that the Supreme Court of Minnesota had failed and refused to give full faith and credit to said decree (Petition, No. 478, pp. 1-2, 7, 15; Petitioner's Brief, No. 478, pp. 6, 23).

That petition was unopposed; but Respondent's brief on the merits exposed the fallacy of the contention that the Petitioner could have any vested rights as against the Respondent under a decree to which the latter was not a

party (Respondent's Brief, No. 478, pp. 4-6, 37-39; Petitioner's Reply Brief, No. 478, pp. 4-6).

The Petitioner now abandons its claim to a vested right under the decree in the *Paramount Case*, and this shift in its position destroys the previous action of this Court in granting a writ of certiorari as a precedent for granting the writ upon the present application.

Petitioner now contends merely that the Supreme Court of Minnesota erred in allegedly holding the Standard Exhibition Contract illegal in its entirety because violative of the Sherman Law and cites the decision and decree in the *Paramount Case* as authorities in support of that contention.

Notwithstanding the *obiter* in its opinion the Supreme Court of Minnesota actually decided no Federal question. The illegality of Clause 18 (compulsory arbitration) of the Standard Exhibition Contract was conceded by the Petitioner. The only question involved, so far as that clause was concerned, was whether it was severable. We must accept the Supreme Court's own estimate of the scope and extent of its decision:

> The question presented on this appeal is whether the arbitration clause is severable from the contract, leaving the remainder of the contract enforceable, or not severable, permeating and tainting the whole contract with illegality and making it void (Rec. 79).*

It is true that the court below, to bolster the view that the compulsory arbitration clause was not severable and possibly to save its own ratiocination, relied upon the decision and decree in the *Paramount Case*. Assuming (but not conceding) that the Supreme Court of Minnesota was incorrect in its estimate of the extent of the ruling of this

*This is from the opinion on the first presentation of the case to the Supreme Court of Minnesota; the opinion on the second presentation merely recites that "for reasons given in the previous opinion and upon authority of that opinion the judgment appealed from is affirmed" (Rec. 104).

Court in the *Paramount Case*, the fact remains that what the court below decided was a question as to the interrelation and interdependence of the several provisions of the contracts sued upon, not a Federal question of anti-trust law.

As to the correctness of the judgment of the Supreme Court of Minnesota on the question actually decided by it, regardless of the appositeness of the authorities cited, attention is invited to Respondent's Brief, No. 478, pp. 11-24. This discussion demonstrates that the compulsory arbitration clause goes to the heart of the Standard Exhibition Contract and is not severable.

II.

The Judgment of the Supreme Court of Minnesota is Consistent With the Decisions of this Court in the Paramount and Other Cases Cited by the Petitioner.

1. *The Paramount Case.* The opinion of this Court, the opinion of District Judge Thacher, and the decree of the District Court (Appendix B to the Petition herein), condemned as a violation of the Sherman Law the agreement of the distributors of motion pictures (including the Petitioner) to adopt and use exclusively the Standard Exhibition Contract, and to adopt the Rules of Arbitration, and all the activities and agreements of said distributors whereby they had collectively coerced adoption of and compliance with said Contract and Rules (Respondent's Brief, No. 478, pp. 6-11).

The specific injunctions were limited to outlawing the compulsory arbitration clause and the rules; but this does not alter the finding of the decree that the agreement to adopt and use the Standard Exhibition Contract and the Arbitration Rules "constitutes a conspiracy in restraint of interstate trade and commerce in violation of the Act of Congress of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restrains and monop-

olies' known as the Sherman Anti-Trust Act" (Decree, Paragraph I).

The provisos of the decree relied upon by the Petitioner (Petition, pp. 4-5), saving to the distributors rights not inconsistent with the provisions of the decree, did not determine the question of severability or preclude the courts of Minnesota from deciding that question as they saw fit. Obviously those provisos were inserted in the decree merely to protect the distributors against a charge of contempt in asserting in any other case whatever legal rights consistent with the decree they might possess (Respondent's Brief, No. 478, pp. 4-6).

2. *Other Cases.* The decision of the Supreme Court of Minnesota is directly in line with the decision of this Court in *Continental Wall Paper Co.* v. *Voight,* 212 U. S. 227, and is not inconsistent with the decisions in *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Wilder Mfg. Co.* v. *Corn Products Ref. Co.,* 236 U. S. 165, and *A. B. Small Co.* v. *Lamborn & Co.,* 267 U. S. 248.

The test whether a contract can be enforced by a party to an illegal conspiracy is whether the contract is merely collateral to or part and parcel of such conspiracy (Respondent's Brief, No. 478, pp. 6-11).

The contracts sued upon in the present case are in no sense collateral to the illegal conspiracy to which the Petitioner was adjudged a party. These contracts are an essential part, and the visible manifestations of, the conspiracy. They were forced upon the Respondent as a result of the conspiracy since he could not obtain the necessary pictures with which to conduct his theatre on any other form of contract (Rec. pp. 39-40; Respondent's Brief, No. 478, pp. 6-11, 24-28).

III.

The Case is Not One of General Public Importance.

Respondent concedes that there is a diversity of opinion among certain lower Federal and State courts as to whether the illegality of Clause 18 invalidated the Standard Exhibition Contract in its entirety. However, Clause 18 was abandoned by the distributors of motion pictures promptly upon the filing of the decree in the *Paramount Case* on January 21, 1930. The record does not disclose that there are any cases involving this question now pending in the courts. The presumption is that the present protracted litigation is the only one remaining and that the point at issue now is of interest only to the parties to this record.

We submit that the Court would not be justified in reviewing this case merely to cure a conflict on an academic question which, under the decree in the *Paramount Case*, can not again arise. And the writ being discretionary, it is respectfully suggested that it would be an undue hardship to subject this Respondent to further proceedings after four years and a half of litigation.

IV.

Assuming (but Not Conceding) that the Court Below Erred in the Particulars Cited in the Petition, Other Grounds Exist on Which the Judgment Must Be Affirmed.

The Respondent's Amended Answer (Rec. 9-21) sets up a number of defenses including the claim that the contracts sued upon—

1. Were a part of a conspiracy in violation of the Sherman Law (Rec. 10-12, 18).

2. Were in and of themselves in restraint of trade (Rec. 12-17, 18).

3. Were unilateral (Rec. 18-20).

By stipulation the contracts were introduced in evidence

and these additional grounds of defense are apparent on the face thereof.

As to the illegality of the contracts wholly apart from the provision specifically enjoined in the *Paramount Case*, we refer to Respondent's Brief, No. 478, pp. 24-28.

As to the lack of mutuality in said contracts we refer to Respondent's Brief, No. 478, pp. 29-37.

CONCLUSION.

It is respectfully submitted that the petition herein does not disclose any adequate or appropriate reason for granting a writ of certiorari in this case and that, therefore, the said petition should be denied.

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May, 1935.